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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

EDGAR D. WHITCOMB, Governor of the State of Indiana and Chairman of State Election Board,

Appellant

v.

PATRICK CHAVIS, ANDREW RAMSEY, MASON BRYANT, ROWLAND ALLEN, WILLIAM WALKER, JR., MARILYN HOTZ,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

MOTION TO DISMISS OR AFFIRM AND, IN THE ALTERNATIVE, EMERGENCY MOTION TO ADVANCE CASE AND TO SET EARLY DATES FOR FILING OF BRIEFS

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The appellees move this Court to dismiss the appellant's appeal from the three-judge court's decision and order of

December 15, 1969* redistricting the State of Indiana or to affirm that order.

In the event, however, that this Court notes probable jurisdiction, then appellees move this Court for an order advancing this case and setting early dates for the filing of briefs because this case will seriously affect appellees and the people of Indiana in the 1970 elections and for as much as ten years or five elections thereafter if it is not decided prior to the 1970 elections.

MOTION TO DISMISS OR AFFIRM

I. WHAT THIS CASE IS ALL ABOUT

The principal holding below was that the apportionment of the Indiana General Assembly is grossly improper under the well settled principles of *Reynolds v. Sims,* 377 U.S. 533 (1964) and *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969). This holding is plainly correct in view of the wide disparities in population among the House and Senate districts. It is perfectly clear that the 24% deviation in House districts and the 28% deviation in Senate districts is far beyond the tolerance of the equal protection clause under *Kirkpatrick v. Preisler.* Thus this case is fundamentally an ordinary, garden variety reapportionment case and the correctness of the decision below is manifest.

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* The three-judge court issued a declaratory judgment rendering the Indiana legislative apportionment statute unconstitutional on July 28, 1969. The defendant, Governor Edgar D. Whitcomb, filed a jurisdictional statement with this Court which was given Docket No. 735. Subsequently, intervening defendants filed a separate jurisdictional statement which was docketed as No. 761, seeking review of the same order. Appellees' motions to dismiss or affirm those appeals are still pending.

A. *What the December 15, 1969 Order Does:*

The order of December 15, 1969 by the three-judge court divides the State of Indiana into 100 House of Representative districts. They are numbered 1 through 100. The districts are combined in numerical order to create 50 Senate districts.

In the House the total deviation is 1.9% and does not exceed 1% on either side of the mean. The Senate districts are even closer to the optimum population distribution.

The Court used 1960 census figures as did the courts in Missouri, *Kirkpatrick v. Preisler,* 394 U.S. 526 (April 7, 1969) and New York, *Wells v. Rockefeller,* 394 U.S. 452 (April 7, 1969) in preparing its plan.

B. *History of the Case—Why the December 15, 1969 Order Was Entered:*

(a) *January 12, 1969 Filing.* On January 12, 1969 appellees filed an action to declare the Indiana apportionment statute unconstitutional. At the trial the appellees asserted three reasons for declaring the statute unconstitutional. They are:

1. The Indiana Statute grossly violates *Reynolds v. Sims,* 377 U.S. 533 (1964) in light of *Kirkpatrick v. Preisler* and *Wells v. Rockefeller,* supra, because the total deviations of 24.780% for the House and 28.197% for the Senate are far beyond even the more flexible guidelines suggested by Justices Fortas, Harlan, Stewart and White in their dissenting opinions in those cases.

2. The multi-member districting of Marion County, Indiana (15 House seats and 8 Senate seats all elected from the County at large) results in an invidious discrimination as to the black ghetto residents in the district in violation of the 14th and 15th Amendments to the Constitution of the

United States and the principles set forth by this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Burns v. Richardson*, 384 U.S. 73 (1966).

3. All combinations of multi-member districts with single member or other multi-member districts of unequal size are unconstitutional even if the districts have representation in direct proportion to their population.

(b) *June 16, 1969 Trial.* On June 16, 1969 and June 17, 1969 the three-judge court heard evidence.

(c) *July 28, 1969 Decision.* On July 28, 1969, the three-judge court found the entire Indiana statute to be clearly defective under *Reynolds v. Sims*, supra; *Kirkpatrick v. Preisler*, supra; and *Wells v. Rockefeller*, supra, because of the gross population variations among districts. *Chavis v. Whitcomb*, 305 F.Supp. 1364 (D.C. Ind. 1969). The three-judge court also found the Indiana statute, as it applies to Marion County, Indiana (Indianapolis and suburban areas) to be clearly defective on the facts developed at the trial because the multi-member districting was shown to have the effect of diluting the voting rights of a cognizable racial minority, namely the black ghetto residents.

The three-judge court also gave consideration to the theory that all multi-member districting plans involving districts of unequal size and representation are inherently unconstitutional, but held that multi-member districts are not unconstitutional per se.

(d) *October 1, 1969 Extension of Time for Legislature to Act.* The three-judge court also indicated in its order and opinion that, while it was mindful of the need to expedite the reapportionment of the state in time for the 1970 elections, it would allow the state until October 1,

1969 to reapportion before any further action would be taken. The lower court waited and nothing happened.

(e) *November 3, 1969 Deadline for Proposing Plans.* Finally, on October 17, 1969, the lower court asked for reapportionment plans from the parties, including appellant, and from various legislative groups such as the committees on reapportionment. The plans were to be submitted by November 3, 1969. The lower court did not, however, cut off the legislature's authority to reapportion itself after October 1, 1969 and has never done so.

(f) *Plans Were Filed and Studied by the Court.* Plans were filed by a large number of groups including the appellees who filed a plan for Marion County alone. On December 15, 1969, the lower court entered an order in which it:

1. Adopted appellees' plan for Marion County as the only plan offered which met the requirements of one man-one vote and avoided racial discrimination.
2. Rejected all other plans, except one for Marion County, on the grounds that the population deviations were too great for a court adopted plan. The one for Marion County was rejected as violating *Fortson v. Dorsey* by joining seven parts of the ghetto with predominantly white voting populations.
3. Adopted its own plan for reapportionment of the remainder of the State. It is this plan, including appellees' plan for Marion County which appellant seeks to attack by this appeal.

II. REASONS TO DISMISS OR AFFIRM APPEAL

Appellant cannot support jurisdiction of the appeal of the December 15, 1969 order unless he can establish:

A. That the lower court abused its discretion in adopting a single member district plan when faced with the appellant's refusal to permit a legislative reapportionment.

B. That a state may not be required to reapportion more than once in a decade no matter how great the earlier disparity.

C. That the lower court abused its discretion by ordering emergency relief this late in the census decade.

III. NONE OF THESE QUESTIONS IS SUBSTANTIAL

A. *Lower Court Did Not Abuse Discretion in Adopting Single Member District Plan.* While evidence in the court below clearly supports the findings that the voting rights of black ghetto residents are diluted in Marion County by the present at-large districting, this issue is rendered moot by the further finding that the entire statute violated *Reynolds v. Sims* and *Kirkpatrick v. Preisler* and by the failure of the legislature to reapportion itself.

The lower court was left with the task of drawing an apportionment plan. This Court has held that artificial political boundaries are to be ignored if they cannot be reconciled with the requirements of equality of population. *Kirkpatrick v. Preisler,* supra. Thus, there remained no basis in this case for the drawing of a plan with multi-member district of varying sizes. The only reason for multi-member districts in the first place was to preserve county boundaries since some county boundaries must be violated in any event. Under the facts of this case, therefore, a dismissal or affirmance would *not* constitute a holding that multi-member districting plans adopted by legislature are unconstitutional, but would simply reflect the obvious and settled proposition that a court, faced with an inpermissible deviation among districts, must adopt a constitutionally acceptable plan.

Thus the single member districting by the lower court here presents no substantial question.

B. *Court Must Order Reapportionment Whenever it Finds State Apportionment Laws Unconstitutional.*

In 1965, the Indiana legislature reapportioned pursuant to court order. *Stout v. Bottorff,* 246 F.Supp. 825 (S.D. Ind. 1965) In the later case of *Stout v. Bottorff,* 249 F.Supp. 488 (S.D. Ind. 1965), the district court approved a legislative apportionment plan which it considered to be a best effort to achieve a constitutional apportionment without breaking county lines. However, this standard is no longer applicable, *Kirkpatrick v. Preisler,* supra. *Res judicata* is inoperative in the event of a major change in constitutional doctrine. *State Farm Mut. Auto Ins. Co. v. Diel,* 324 U.S. 154 (1945); *Christian v. Jemison,* 303 F. 2d 52 (5th Cir. 1962).*

In addition, in the earlier of the two lower court opinions in *Stout v. Bottorff,* supra, the court specifically recognized that new constitutional tests were a possibility and reserved for a plaintiff in that case the right to assert such claims. The court said:

> "The Third Supplemental Complaint of plaintiff Grills will be dismissed without prejudice to his right to assert any valid claims with respect to the matter of Indiana legislative apportionment in the future." 249 F.Supp. at 829.

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* Res judicata may also be inoperative because the named parties plaintiff in *Stout v. Bottorff* are not the same persons (nor do they represent the same interests) as those in the case at bar. It is unclear from the opinion whether or not the *Stout* case purported to be a class action on behalf of all citizens of Indiana. The Court's discussion does not treat the case as a class action.

Moreover, the apportionment plan approved in the second *Stout v. Bottorff* case was never appealed and was decided shortly after *Reynolds v. Sims* and long before the refinement of the guidelines had taken place in cases such as *Swann v. Adams,* 385 U.S. 440 (1967); *Sincock v. Gately,* 262 F.Supp. 739 (D.C. Del. 1967); *Long v. Docking,* 283 F.Supp. 539 (D.C. Kan. 1968).

C. *The Timeliness of the Lower Court's Order:*

The question of whether an apportionment can be ordered this late in the decade, and on the basis of 1960 census figures, has already been answered by this Court. *Kirkpatrick v. Preisler,* supra, and *Wells v. Rockefeller,* supra, both involve use of the 1960 census figures for redistricting for the 1970 election. Even the dissenting Justices did not question this point. Thus the lower court here cannot be found to have abused its discretion to determine that justice requires a reapportionment in Indiana at the close of the decade even though other lower courts may, on different facts or even the same facts, have reached a contrary conclusion.

Since the legislature elected in 1970 will, in all likelihood, reapportion and redistrict the state for the next decade, justice in fact demands that it be a constitutionally sound legislature.

Moreover, other than the 1960 census, there are no figures sufficiently detailed, or of statewide application, or known to be reasonably accurate which can be used to reapportion the state. Figures relied upon by appellant for Marion County were not submitted at the trial, are not of statewide application and are nothing more than estimates based upon building and demolition permits.

Finally, the decennial census is the only constitutionally sanctioned method for resolving this problem. A clear rule

endorsing its use throughout each decade will avoid widespread and repetitious litigation.

Appellant's references to decisions of other counts in December of 1969 are also inapposite in view of the lower court's determination in July that the Indiana apportionment act was defective. The delay until December was solely to permit the state legislature to avoid the need for judicial action. Finally, appellant does not dispute the basic factual determination that the statewide apportionment is grossly unconstitutional and at large districting dilutes the voting rights of inner-city residents. These considerations fully justify the lower court's order under the circumstances of this case.

IV. OTHER MATTERS RAISED BY APPELLANT

A. The question of gerrymandering raised by appellant's second and sixth numbered questions is not presented by this case. The plan of apportionment does not track racial lines, but simply protects the voting power of inner city residents. See the map attached as Appendix A to this motion superimposing the reapportionment plan on the ghetto area of Indianapolis and demonstrating that the factual premise of appellant's issue is lacking in this case.

B. Appellant's third numbered issue is wholly insubstantial. It is well settled that issues tried by consent of the parties are properly tried in the federal courts and the pleadings are treated as amended to conform to those issues. Fed. R. Civ. Proc. 15(b). The question of the constitutionality of the entire statutory apportionment plan was raised at the outset of the trial on June 16, 1969 and was tried by consent. Moreover, plaintiff William Walker is a resident of Lake County (East Chicago) and did complain initially of his underrepresentation. (See complaint in record of No. 735) The disparity of representation between

Lake and Marion County was over 18% in the statutory apportionment of the Indiana Senate and favored the latter county. (See Appendix to Jurisdictional Statement in No. 735, pg. 50)

V. CONCLUSION

Appellees pray that this appeal be dismissed or that the decision in the lower court be affirmed summarily.

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ALTERNATIVE EMERGENCY MOTION TO ADVANCE CASE AND TO SET EARLY DATES FOR FILING BRIEFS

On February 5, 1970 the appellees sought advancement of this case on the docket of this Court and early deadlines for filing briefs. On February 6, 1970 this Court denied appellees' motion "without prejudice to its renewal following the filing of the statement as to jurisdiction."

In the event that this Court should note probable jurisdiction, the reasons for advancement of the case pursuant to Rule 43(4) and for early deadlines for filing briefs pursuant to Rule 41(4) are as follows:

Appellant in no way contends that the lower court's finding under *Fortson v. Dorsey*, 379 U.S. 433 (1965) is incorrect or not legal or that the finding of a general malapportionment is in any way incorrect. No issue of any complexity is presented in this cause.

1. In view of the impending Indiana primary election, this case cannot await decision in the normal course of the Court's docket. Both sides agree. See memoranda support-

ing and opposing stay filed January 29, 1970 and January 31, 1970.

2. The present Indiana apportionment statute, apparently revived by this Court's stay granted February 2, 1970, is plainly unconstitutional under *Reynolds v. Sims,* supra, and *Kirkpatrick v. Preisler,* supra, and the three-judge court's decision on this issue is obviously correct in view of the 28% population variance among the various districts.

3. Under the Court's customary schedule the stay order granted by this Court on February 2, 1970 will preclude the black ghetto population of Indianapolis, Indiana from having any representatives of their choosing in the forthcoming Indiana General Assembly election because filing opens on February 24, 1970 for legislative candidates.

4. The stay will thus preclude the black ghetto population from having representatives of their choosing who will participate in the apportionment of legislative seats and congressional districts for the decade of the 70's because the next Indiana legislature will meet in January of 1971 and will be charged with that responsibility due to the 1970 decennial census.

5. This case affects voting rights for more than a single election and is, therefore, of tremendous importance to the appellees and to the citizens of Indiana.

6. The black ghetto population of Indianapolis, under the guidelines of *Fortson v. Dorsey,* supra, was found by the lower court, as a matter of evidence, to be a cognizable racial element of the voting population of the district (Marion County, Indiana) whose vote is minimized by the present multi-member districting scheme now in effect.

7. The only difference between this case and the cases of *Wells v. Rockefeller,* supra, and *Kirkpatrick v. Preisler,* supra, is the special finding of fact relating to the black

ghetto residents of Indianapolis in accordance with *Fortson v. Dorsey*, supra. The lower court has merely applied *Fortson v. Dorsey* to the facts. All issues have been thoroughly briefed in the lower court and will require little more than copy work for re-briefing here.

8. The only new issue raised is whether reapportionment can properly take place at this point in the decade. Appellees want to be heard if this is the basis for the court's granting of the stay.

9. The entire record of this case, and nos. 736 and 761, has already been filed with the Clerk. Appellant's jurisdictional statement and appellees' motions to dismiss or affirm are on file in this case and in nos. 735 and 761 pending in this Court.

10. Briefing in this case can be accelerated and advanced as has been done in other reapportionment cases, *Scott v. Germano*, 381 U.S. 407, (1965), (23 days between decision of district court and final decision on appeal to this Court). Resources available to the appellant are far greater than those of the appellee and appellee is prepared to brief and argue this case *now*.

11. All delays in seeking review of this case have been caused by the appellant and appellees have never used more than a fraction of their time at any stage in the lower court or in this Court.

12. Appellant has avoided the merits at all times and has sought delay, and to now permit a state official to gain substantive benefits by the tactic of delay will cause this Court's voting rights mandates to suffer the same fate which school desegregation mandates have suffered for sixteen years. Cf. *Alexander v. Holmes County Board of Education*, 24 L.Ed. 2d 19 (1969).

WHEREFORE, if this Court notes jurisdiction, appellees pray for the advancement of the case and of the dead-

lines for filing briefs so that a decision may be rendered on the merits and appellees will have their rights protected in the 1970 election.

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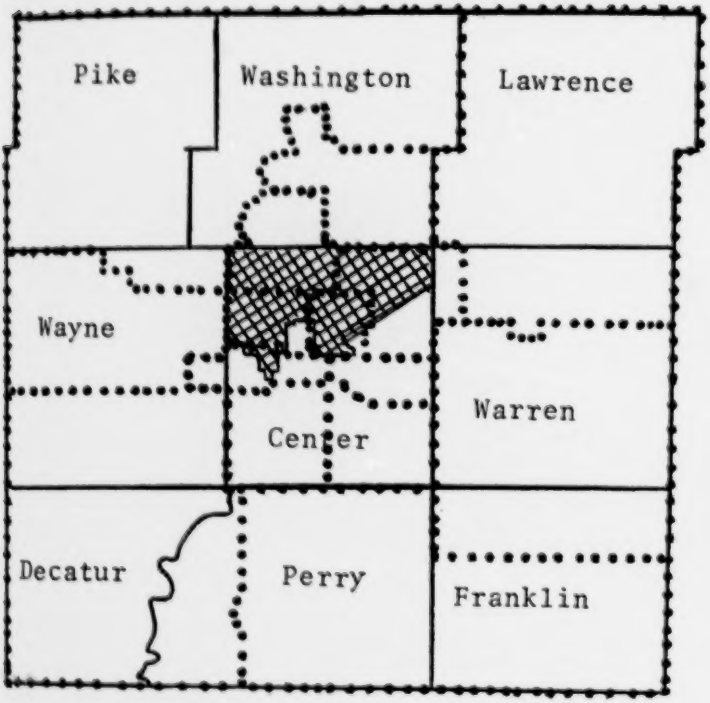
APPENDIX A

MARION COUNTY, INDIANA



The two maps are drawn from the lower court's opinion 305 F. Supp. at 1381 (Center Township Ghetto) and the plaintiffs' proposed apportionment plan filed with the record in this Court and adopted by the lower court.